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October 29, 2007

National Labor Relations Board
Office of the Executive Secretary
Attn: Lester A. Heltzer,
Executive Secretary
1099 14th Street, N.W.
Washington, DC 20570
:

Re: The Lorge School
Case No. 2-CA-37967

Dear Mr. Heltzer:

Pursuant to Section 102.46 of the Board's Rules and Regulations, enclosed please find the original and seven copies of General Counsel's Cross Exceptions and Brief in support of its Cross Exceptions to the decision of the Administrative Law Judge, which were e-filed on October 29, 2007.

Very truly yours,

Lindsay R. Parker
Counsel for the General Counsel

cc:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

THE LORGE SCHOOL,
Respondent

and

Case No. 2-CA-37967

LINDA COOPERMAN,
Charging Party

**GENERAL COUNSEL'S CROSS EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Lindsay R. Parker
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Region 2
26 Federal Plaza, Room 3614
New York, NY 10278

Dated at New York, New York
October 29, 2007

In accordance with Section 102.46(e) of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the General Counsel, by its Counsel Lindsay R. Parker, hereby files the following cross-exceptions to the Administrative Law Judge's Decision and Recommended Order ("ALJD") dated August 3, 2007:

Cross Exceptions are filed to:

Reinstatement of Cooperman

1. The ALJ's failure to order reinstatement of Cooperman. (Administrative Law Judge's Decision "ALJD" p. 11-12).

Audio Recordings

2. The ALJ's finding that Rouse's audio recordings during grievance meetings in September 2006 and May 2007 were not properly admitted. (ALJD p. 8, fn 10, G.C. Ex.s 7 and 14, Tr. 98-100, Tr. 557-558).
3. The ALJ's failure to allow the General Counsel to present corroborative evidence regarding events evidenced by recordings, in light of the ALJ's later finding that the recordings were improperly admitted. (ALJD p. 8, fn 10, Tr. 304-305).
4. The ALJ's failure to find that even in the absence of recorded evidence, the testimony about the recorded events demonstrates animus by Respondent towards Rouse and Piccigallo. (Tr. 304-305, Tr. 449-452)

Credibility

5. The ALJ's failure to credit Cooperman more generally than he did.
6. The ALJ's failure to specifically discredit Kasner and Osman more generally than he did.
7. The ALJ's failure to specifically credit Rouse and Piccigallo.
8. The ALJ's failure to draw an adverse inference from Malloy's lack of testimony contradicting Rouse.

Testimony of Blowe

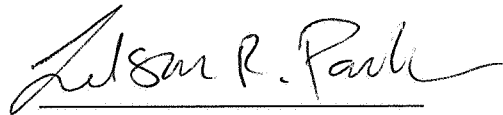
9. The ALJ erred in denying General Counsel's offer to read portions of Blowe's affidavit into evidence. (ALJD p. 7, fn 8; Tr. 676-677).
10. The ALJ erred in finding that Respondent's attempts to induce Blowe to oust the Union were harmless. (ALJD p. 3, 7 fn 8; Tr. 671, 674-75, 678-79).

General Counsel respectfully urges that the findings and conclusions of the Administrative Law Judge excepted to in the instant cross-exceptions be reversed and that the Board make a finding that Respondent violated Section 8(a)(1) of the Act as alleged and order traditional reinstatement, make-whole, and notice remedies.

Dated at New York, New York

October 29, 2007

Respectfully submitted,

A handwritten signature in cursive script, reading "Lindsay R. Parker". The signature is written in dark ink and is positioned above a horizontal line.

Lindsay R. Parker
Counsel for the General Counsel

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

THE LORGE SCHOOL,
Respondent

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Case No. 2-CA-37967

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Charging Party

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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26 Federal Plaza, Room 3614
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Dated at New York, New York
October 29, 2007

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
I. STATEMENT OF THE CASE.....	1
II. ISSUE PRESENTED.....	2
III. STATEMENT OF FACTS.....	2
Respondent, the Union, and key personnel.....	2
Respondent's relationship with the Union and Union Representatives.....	3
In late spring of 2006, the State Education Department issued a highly-critical report about the School's educational program and Respondent's Executive Director and Instructional Supervisor retired.....	5
Respondent interviewed and hired Linda Cooperman to be the new Instructional Supervisor at the School.....	6
Kasner complained to Cooperman about the Union activities of the Union Representatives.....	8
Kasner told Cooperman to create a hostile work environment for the Union representatives.....	10
Kasner criticized Cooperman's cooperative approach toward Rouse and Piccigallo.....	11
Cooperman proposed departmentalization of classes for middle and upper-level students to bring the school into compliance with State mandates.....	12
At a Leadership Team meeting on July, 28, Respondent insisted that Rouse and Piccigallo had to be discharged.....	17
On July 31, 2006, Kasner rejected Cooperman's departmentalization plan.....	18
Respondent discharged Linda Cooperman on August 1, 2006, after her second Leadership Team meeting.....	18
A School Custodian overheard Kasner and Bernard admitting that Cooperman had been fired for not discharging Piccigallo and Rouse.....	20
Respondent continued to display of hostility toward the Union and its representatives after firing Cooperman.....	20

<i>Osman threw a contract at the Union delegate during a grievance meeting</i>	20
<i>Kasner threatened to discharge a temporary employee and increase Rouse and Piccigallo's duties if they pursued a grievance on behalf of the employee.....</i>	22
<i>Current Instructional Supervisor Barry Malloy told Rouse that unfair harassment against him will continue regardless of his job performance.....</i>	23
IV. ARGUMENT.....	25
<i>The Administrative Law Judge erred in failing to order reinstatement of Cooperman.....</i>	25
<i>The Administrative Law Judge's findings in regards to the audio recordings were erroneous.....</i>	28
The ALJ erred in finding that Rouse's audio recordings during grievance meetings in September 2006 and May 2007 were not properly admitted	28
The ALJ erred in failing to allow the General Counsel to present corroborative evidence regarding the content of the recordings in light of the ALJ's later finding that the recordings were improperly admitted.....	30
The ALJ erred in failing to find that even in the absence of recorded evidence, the testimony about the recorded events demonstrates significant animus by Respondent towards Rouse and Piccigallo.....	31
<i>The Administrative Law Judge erred in making several significant credibility determinations.....</i>	32
The ALJ erred in failing to credit Cooperman more generally than he did.....	32
The ALJ erred in failing to specifically discredit Kasner and Osman more generally than he did.....	33
The ALJ erred in failing to specifically credit Rouse and Piccigallo.....	34
The ALJ erred in failing to draw an adverse inference from Malloy's lack of testimony contradicting Rouse.....	34
<i>The ALJ made erroneous findings in relation to the testimony of Blowe.....</i>	35
The ALJ erred in denying General Counsel's offer to read portions of Blowe's affidavit into evidence.....	35
The ALJ erred in finding that Respondent's attempts to induce Blowe to oust the Union were harmless.....	36
V. CONCLUSION AND REMEDY.....	38

TABLE OF AUTHORITIES

<i>Belcher Towing Co. v. NLRB</i> , 614 F.2d 88 (5th Cir. 1980).....	26
<i>Carpenter Sprinkler Corp.</i> , 238 NLRB 974 (1978).....	29
<i>Delling v. NLRB</i> , 869 F.2d 1397 (10th Cir. 1989).....	26
<i>East Belden Corp.</i> , 239 NLRB 776, 782 (1978), enfd. 634 F.2d 635 (9th Cir. 1980).....	26
<i>Howard Johnson v. NLRB</i> , 702 F.2d 1 (1st Cir. 1983).....	26
<i>International Automated Machines</i> , 285 NLRB 1122 (1987).....	35
<i>Kenrich Petrochemicals v. NLRB</i> , 907 F.2d 400 (3 rd Cir. 1990).....	25-26
<i>Monroe Mfg.</i> , 323 NLRB 24 (1997).....	29
<i>New Life Bakery</i> , 301 NLRB 421 (1991).....	35
<i>Orange County Publications</i> , 334 NLRB 350 (2001).....	29
<i>Pioneer Hotel, Inc.</i> , 324 NLRB 918 (1997).....	25
<i>Professional Medical Transport, Inc.</i> , 346 NLRB No. 108 (2006).....	25
<i>Russell Stover Candies, Inc. v. NLRB</i> , 551 F.2d 204 (8 th Cir. 1977).....	26
<i>Silver Spur Casino</i> , 270 NLRB 1067 (1984).....	37
<i>Talladega Cotton Factory</i> , 213 F.2d 209, 217 (5 th Cir. 1954).....	26
<i>The Salvation Army</i> , 345 NLRB No. 48, at fn 7, (2005).....	35
<i>Three Sisters Sportswear Co.</i> , 312 NLRB 853 (1993).....	35
<i>Triple A Fire Protection</i> , 315 NLRB 409 (1994).....	29
<i>Trus Joist MacMillan</i> , 341 NLRB 369 (2004).....	25
<i>Waltz Masonry</i> , 323 NLRB 1258 (1997).....	29
<i>Wellstream Corp.</i> , 313 NLRB 699, 711 (1994).....	29
<i>Weisser Optical Co.</i> , 274 NLRB 961 (1985).....	37

I. STATEMENT OF THE CASE

On November 8, 2006, Linda Cooperman (herein Cooperman) filed Case No. 2-CA-37967 against The Lorge School (herein Respondent, or the School). The charge, which was amended on December 19, 2006, alleges that Respondent discharged Cooperman in retaliation for her refusal to discharge or discipline employees on the basis of those employees' union activities and activism, in violation of Section 8(a)(1) of the National Labor Relations Act (G.C. Ex. 1(c)). The Complaint likewise alleges that Respondent violated Section 8(a)(1) by discharging Cooperman because she refused to commit unfair labor practices (G.C. Ex. 1 (e)). Respondent filed an Answer denying the alleged violation (G.C. Ex. 1(i)).

After a hearing held on May 30, 31, June 1, and June 13, 2007, Administrative Law Judge Raymond P. Green issued his decision on August 3, 2007, finding that Respondent violated Sections 8(a)(1) of the Act by discharging Cooperman because of her refusal to assist in causing the resignation or constructive discharges of Chris Piccigallo and James Rouse because of their activities as union representatives. On September 17, 2007 Respondent filed exceptions to the decision and a supporting brief. Pursuant to Section 102.46(e) of the Rules and Regulations of the National Labor Relations Board, General Counsel submits the instant brief in support of Cross-Exceptions to the Decision of the Administrative Law Judge.

II. ISSUE PRESENTED

Whether Respondent violated Sections 8(a)(1) of the Act by discharging Linda Cooperman.

III. STATEMENT OF FACTS

Respondent, the Union, and key personnel.

Respondent operates a publicly funded private school for learning- and emotionally-disabled students in grades kindergarten through 12 in a five-floor building in Manhattan (ALJD p. 2, Tr. 22, 24, 110, 113-114, 153)¹. There are between 70-90 students in the school and approximately 8-10 students in each classroom. Students are grouped by age into eleven primary classrooms, each with a teacher and teaching assistant (ALJD p. 2, Tr. 23, 153).

Reporting to the Board of Trustees, Deborah Kasner has been Respondent's Executive Director, with overall responsibility for Respondent's labor relations, since mid-June, 2006 (ALJD p. 2, Tr. 21, 28). Kasner had been working at Lorge since 1996 as a Social Worker and then as Clinical Supervisor (Tr. 26, 20-21). Since the end of June, 2006, Clinical Supervisor David Osman has been the Contract Administrator for Respondent, handling the initial stage of grievance processing in addition to supervising the school's four social workers (ALJD p. 2, Tr. 28-29, 498).

The United Federation of Teachers (herein, the Union) has represented Respondent's teachers and other non-administrative personnel since 2000 (Tr. 27, 269,

¹ Abbreviations are used to refer to record evidence as follows: ALJD = Administrative Law Judge's decision, Tr. = Transcript of Hearing, Jt. Ex. = Joint Exhibit, G.C. Ex. = General Counsel's Exhibit, R. Ex. = Respondent's Exhibit.

G.C. Ex. 3). The current collective- bargaining agreement was signed in April of 2006, and is effective through June 30, 2008 (ALJD p. 3, Tr. 27, G.C. Ex. 3).

Since 2002, classroom teacher Christopher Piccigallo has been the Union's Chapter Leader at the school and music teacher James Rouse has been the Union Delegate (ALJD p. 3, Tr. 266, 429, 715). Piccigallo and Rouse together handle grievances at Step One and Two (ALJD p. 3, Tr. 267-69). Among other duties, Piccigallo participates in contract negotiations and Rouse orients new members, distributing copies of the Union contract and dues-authorization check-off cards (Tr. 267, 430). Rouse and Piccigallo attend bi-monthly Union-management meetings with Kasner, Osman, Assistant Dean Pierre, and a few other staff members (Tr. 267-68).

Rouse has worked for Respondent for more than ten years, is the highest-paid teacher, and has received uniformly positive appraisals (Tr. 125-26, 265). Piccigallo has also received only positive appraisals in his six years at the school (Tr. 126-27).

Respondent's relationship with the Union and Union Representatives.

Christopher Piccigallo and James Rouse have been active on behalf of the Union at the school since the organizing campaign began. They marched in demonstrations in front of the school with the inflated rat, talked with fellow employees about the Union, and handed out leaflets (Tr. 270, 429-30, 269-70, 458). Piccigallo participated in negotiations for both contracts (Tr. 430).

Conflict with management was apparent from the Union's earliest days at the school. During the term of the first Union contract, Deborah Kasner, then Clinical Supervisor, served as Contract Administrator for the School under then-Executive

Director Michael Pagliuca (Tr. 28, 142, 430). Kasner complained often during this period about the Union being adversarial during grievance hearings (Tr. 430).

Although the ALJ did not rely on this information, it is important to note that in June of 2003, Rouse asked the then-Dean of Students Maggie Bacon why a friend whom he had recommended for a job was not being hired by the school (Tr. 270-71). Bacon told him, "I am not hiring your friend because of you and your union crap. One thing goes wrong between myself and your friend, you're going to be up in my face because of your union crap defending his rights" (Tr. 271). The friend was eventually hired after Rouse complained to Pagliuca (Tr. 272).

In June 2006, shortly before he retired, Pagliuca wrote up then-custodian Edwin Blowe for a failure to maintain hallway lights. At the time, Blowe had had a recent personal disagreement with Piccigallo (Tr. 672, 674, 679). When Pagliuca gave Blowe his write-up and asked whether he wanted a Union representative, Blowe replied that he did not "deal with the Union." Pagliuca then asked Blowe, "why don't you try to get rid of the union if you don't need them?" (Tr. 672-74). He told Blowe that the school wanted the union out of the building, and that he only needed a certain number of votes to get the union out (Tr. 671, 674, 678). Later, he called Blowe in to meet with himself and Martha Bernard (Tr. 670, 674, 679). He told Blowe that he needed 30% of the votes to get the union out of the building and Blowe said, "okay" (Tr. 671, 674-75, 678-79). Bernard and Pagliuca met with Blowe subsequently and Bernard asked Blowe whether he had started "getting the votes" (Tr. 675). Blowe said he had not, and did not speak with them again about the matter (Tr. 675).

For years, Rouse has helped bargaining unit personnel with obtaining certification with the New York State Education Department, pursuant to Article 7 of the collective-bargaining agreement (Tr. 267, 274, G.C. Ex. 3, p. 7).² In mid-July, 2006, in part prompted by a State review of the school described below, Rouse asked Kasner for contact information for new bargaining-unit employees so that he could provide them with certification-related information (ALJD p. 3, Tr. 287-88, 364-65, 432). Kasner told Rouse she felt uncomfortable giving him the information. When he followed up a week or two later, telling her he was entitled to the contact information under the NLRA, she said she had to talk to her people about it (Tr. 289). The information was at last provided only after Chapter Leader Piccigallo sent a July 27, 2006, letter to Kasner formally requesting it (ALJD p. 3, Tr. 289, 366, 432-33, G.C. Ex. 11).

In late spring of 2006, the State Education Department issued a highly-critical report about the School's educational program and Respondent's Executive Director and Instructional Supervisor retired.

In the late spring of 2006, Respondent's Executive Director Michael Pagliuca resigned, and Instructional Supervisor Dr. Elaine Dawes retired (ALJD p. 2, Tr. 37, 38, 410). During this period, the New York State Education Department drafted and issued a, "Special Education Quality Assurance Focused Review" of Respondent, herein referred to as the "State Report" (ALJD p. 2, Tr. 35-36, 128-29, 608, G.C. Ex. 4).

The State Report identified numerous serious deficiencies at the school. Respondent's administrators, including Kasner, were cited for lack of proper certification. The State limited uncertified administrators to spending no more than 25% of their time in a supervisory capacity (Tr. 36, 115, G.C. Ex. 4 p. 1 of portrait and

² Article 7 of the contract, which appeared also in the parties' prior contract, mandates that teachers must be certified in accordance with the New York State Education Department requirements (G.C. Ex. 3, p. 7).

landscape charts). Regarding the educational program, the State Report recommended that the school initiate a diploma program to replace their G.E.D.-focused program (Tr. 37, 43-44; G.C. Ex. 4, p. 16 landscape). Among the lower-level classes, the Report found a failure to teach according to State standards (Tr. 44; G.C. Ex. 4, p. 13 landscape). It noted as well that all teachers should have a copy of each student's Individual Education Plan (IEP) (Tr. 131-132, G.C. Ex. 4, p. 2 portrait).

Respondent interviewed and hired Linda Cooperman to be the new Instructional Supervisor at the School.

In May, 2006, Cooperman interviewed twice with members of Respondent's Board of Trustees for the position of Executive Director (Tr. 154, 157). In the first interview, she fielded questions about her background and shared some negative impressions she had of the school from a recent tour. The trustees told her they wanted to make improvements (Tr. 155, 215, 576). During this meeting, Board Chair Martha Bernard said that there had been problems with the Union at the school and asked Cooperman specifically about her experience with unions (Tr. 155). Cooperman explained that as a teacher she had been a union member and a delegate in the school where she taught, and as a school administrator she had dealt with union issues from the management perspective (Tr. 155). She noted that she had never had any grievances brought against her, and that grievances she handled had always been resolved at the first step (Tr. 155).

After her second interview, Board Member Howard Johnson notified Cooperman that another candidate had been selected. Shortly thereafter, he emailed her to ask whether she would be interested in the Instructional Supervisor position and she responded that she would (Tr. 157). Johnson forwarded Cooperman's resume to Kasner,

and in early June, 2006, Kasner interviewed Cooperman (Tr. 26, 158). Kasner asked Cooperman whether she would have a problem reporting to Kasner, having been herself rejected for the Executive Director position (Tr. 158). Cooperman told her that she thought not, that she looked forward to the chance to play a leadership role in the school as Instructional Supervisor (Tr. 158). Kasner admitted to Cooperman that she was not licensed as a school administrator, and asked whether it would be a problem for Cooperman to work with someone who was not an educator (Tr. 158, 214).³ Cooperman replied that she would be happy to work with Kasner as a partner (Tr. 158).

During the interview Kasner and Cooperman discussed Cooperman's experience dealing with children with learning disabilities. They also talked about Cooperman's experience with schools undergoing change, given that Kasner was new to the Instructional Supervisor position and Cooperman was replacing an Instructional Supervisor who had been at the school for five years (Tr. 29-30, 38). Kasner felt that Cooperman had interesting ideas about developing the school's academic programs (Tr. 30). Kasner determined that Cooperman had good experience that would prepare her to supervise staff appropriately and provide instructional leadership in accord with the State Report mandates, and decided to hire her (ALJD p. 2, Tr. 35-36, 131).

Cooperman began as Instructional Supervisor at the school on July 10, 2006, during the summer session (Tr. 29, 59, 152-3). She was responsible for supervising and evaluating the teaching staff, and for maintaining an instructional program that met State standards (Tr. 153, 114-115).⁴ She reported directly to Kasner and was a member of the

³ Kasner has no certifications with regard to supervision of educational personnel (Tr. 108). Her background is in social work and not education; she has never taught (Tr. 39, 106-07).

⁴ Kasner acknowledged that the Instructional Supervisor position requires a school administrator's license (Tr. 115).

school's leadership team along with Kasner, Osman, Bradley, and Pierre (Tr. 154). At Kasner's request, the school's prior Instructional Supervisor, Dr. Elaine Dawes, stayed on at the School for the first two weeks of Cooperman's tenure, to help orient her (Tr. 37, 413). Cooperman spent her entire first week with Dawes, learning about the school and Dawes's efforts there (Tr. 159, 217, 413).

That first week Cooperman spoke with Dawes about the Report (Tr. 162). Dawes told her that with respect to State standards, students were being prepared for a GED and community internship experiences because the school administration had determined that they were incapable of meeting the State standards (Tr. 161-62). With respect to the Report's limitations on administrative duties performed by non-certified individuals, Dawes told Cooperman, "the school is yours," because Cooperman would be the only administrator with proper State certification (Tr. 36, 216, 413, 415). She also told Cooperman that her status as sole certified administrator would task her with supervising the Dean and Assistant Dean in addition to supervising the teaching staff, though Kasner later contradicted that (Tr. 216-17, 163-64, 242).

Kasner complained to Cooperman about the Union activities of the Union Representatives.

On Cooperman's second or third day, she asked Kasner for her impressions of the teachers (Tr. 165, 591). As they began to review the list, Kasner received a telephone call from Bernard (Tr. 165, 170-71). She told Cooperman that Bernard had been calling about two grievances she was facing from the Union (ALJD p. 2, Tr. 165, 243). The first grievance involved custodian Blowe's two-day suspension for the hallway light; Kasner told Cooperman that the Union was objecting to the suspension and asking for backpay

(Tr. 165-66, 243). Kasner told Cooperman she thought the grievance had merit but that she did not like the Union's approach to her about the issue (Tr. 166).⁵ The second grievance involved a letter in the file of a janitor thought to be selling bootleg videos in the school's basement (Tr. 167-68, 243-44).

Kasner told Cooperman that the prior administration had been "very soft" on teachers and allowed the teachers to control the school (ALJD p. 3, Tr. 166). She said they had made decisions about the school with an eye to avoiding grievances but that she would "show them who's boss." (ALJD p. 3, Tr. 166). Cooperman suggested that the disputes could be resolved (Tr. 172). The two then briefly discussed some of the teachers at the school and adjourned to resume in the afternoon (Tr. 169, 173).

During the afternoon, Kasner and Cooperman were interrupted by another phone call, this time from Teaching Assistant Conchetta Diaz (Tr. 174, 228). When the call ended, Kasner told Cooperman that Diaz had been crying because James Rouse had told her she would be fired by the end of the year if she did not get her teaching certification (ALJD p. 3, Tr. 176, 228). Kasner angrily complained that James Rouse had upset Diaz – she said Rouse was acting beyond the bounds of his job, and wanted to be an administrator (ALJD p. 4, Tr. 174).⁶ Kasner told Cooperman that Rouse had applied for both the Executive Director and Instructional Supervisor positions (Tr. 168, 175). Kasner then complained that Rouse had tried to distribute a letter to staff about how they could

⁵ This grievance was resolved by settlement dated August 6, 2006, with Blowe receiving pay for one of the two days (Tr. 520-22, R. Ex. 6).

⁶ Rouse testified that in July, 2006, Piccigallo had asked him to check on Diaz's certification because Kasner had asked about it (Tr. 284-85, 433). When he learned from Diaz that she had not progressed toward certification, he told her it was a job requirement under the Union contract, and that she and any staff member could be fired without it (Tr. 284). Rouse reported the conversation to Kasner, noting that he would help Diaz with the certification process (Tr. 286). Diaz had not cried during her conversation with Rouse, but Kasner told him that Diaz was upset about it and very scared of being fired (Tr. 286, 340-41).

find information on the internet about certification (Tr. 175-76, 276-77, G.C. Ex. 9).

Kasner told Cooperman that informing the staff about that was an administrative task and not Rouse's job (Tr. 168, 175). She told Cooperman to "watch out" for Rouse, not to trust him, and not to let him control her (ALJD p. 4, Tr. 168, 175). She said that Rouse wanted their jobs and had created a lot of trouble for the school (ALJD p. 4, Tr. 175).⁷

When Kasner and Cooperman reached Christopher Piccigallo's name on the list of teachers, Kasner told Cooperman he was an average teacher. She opined that Piccigallo was "fulfilling administrative ambition" by being a Union leader (ALJD p. 4, Tr. 177).⁸

Kasner told Cooperman to create a hostile work environment for the Union representatives.

During Cooperman's second week at the school, Kasner called her into her office and spoke with her alone. Kasner told Cooperman, "I want you to make it difficult for James and Chris to stay here" (ALJD p. 4, Tr. 178, 229). Cooperman asked Kasner whether she was being asked to create a hostile work environment, and Kasner said, "yes" (ALJD p. 4, Tr. 178, 229-30). Cooperman told Kasner that she could not do that (ALJD p. 4, Tr. 178). She said that going after the Union leadership would not sit right with the teaching staff, with whom she had to build relationships (Tr. 179). She told Kasner that she could evaluate Rouse and Piccigallo's performance on the job and that Kasner could use any negative evaluation as she saw fit (Tr. 179). Kasner told

⁷ Kasner testified that she had frequently found Rouse sitting in the dark in his room with the students, doing nothing, and that she told Cooperman to be sure Rouse was in fact delivering instruction as reflected in his lesson plans (Tr. 595). She acknowledged telling Cooperman that Rouse believed he knows what is best for the school (Tr. 596).

⁸ Kasner testified that she told Cooperman that Dawes perceived Piccigallo to be one of the strongest teachers in the school, and that his students had relatively high test scores. However, Kasner said she herself had some concerns about his manner when he spoke with the children and "we needed to work with him" on that, though he was "quite a strong teacher" (Tr. 596-77).

Cooperman that as a member of the leadership team she had to take direction from the team's head, Kasner, and to refuse would show that she was not a team player (ALJD p. 4, Tr. 179). Cooperman said she thought she was a team player, and was working and thinking very hard about how to elevate the instruction at the school and respond to the State report (Tr. 179-80).

During this conversation, Kasner gave Cooperman a copy of the Union contract and told her she would, "have to be dealing with these people. You might as well be informed." (Tr. 180). Kasner said she, "could see it happening all over again," which Cooperman took as a reference to administrators being soft on teachers (ALJD p. 4, Tr. 181).

Kasner criticized Cooperman's cooperative approach toward Rouse and Piccigallo.

During her first two weeks at the school, Cooperman observed a class taught by Piccigallo as part of a "Junior Great Books" program (Tr. 181). Cooperman told Piccigallo afterwards that she had some concerns about the way he implemented the lesson and what the program was trying to achieve (Tr. 183, 434-35, 463). Piccigallo did not feel personally attacked by Cooperman, but he told Rouse her criticism of his teaching had bothered him, and Rouse offered to speak to Cooperman on his behalf (Tr. 291, 333-34, 435, 463, 465). Rouse visited Cooperman in her office a day or two later and told her Piccigallo had been hurt by her criticism (Tr. 183, 232, 292). Cooperman told him she hadn't meant to make Piccigallo feel bad and would talk to him again (Tr. 183, 232, 292). During this conversation, Rouse and Cooperman discussed (Tr. 183, 293) talked a bit about Rouse's experience teaching, and then Cooperman asked him to create a glee club for the school (Tr. 184, 293). Rouse said he would try (Tr. 184, 293).

The next day, Kasner asked Cooperman why Rouse had been in Cooperman's office, and Cooperman. Kasner told Cooperman she had the right to evaluate Piccigallo however she saw fit. When Cooperman told Kasner she planned to speak with Piccigallo again, Kasner asked Cooperman whether she was a "people pleaser" (Tr. 184). Kasner told Cooperman that Rouse had been trying to manipulate and manage her, and that she was allowing him to be an administrator over her by discussing the Eisenhower Program (Tr. 184-85). Kasner told Cooperman to be very careful not to let that happen, and that Rouse could not be trusted (Tr. 184-85).

Cooperman proposed departmentalization of classes for middle and upper-level students to bring the school into compliance with State mandates.

During her first two weeks at the school, Cooperman observed students and consulted with teachers and social workers about their impressions of the school, including what was good and what needed changing (Tr. 198-99, 439-40, 413). She discovered that the school's teachers lacked licenses to teach particular subjects, and that many were inexperienced (Tr. 47, 212). Lesson plans she reviewed were inadequate to ensure the students were being properly educated (Tr. 213).

New York State licenses teachers of grades 6 and higher for particular subject areas, while elementary school teachers are licensed to teach all subject areas for all elementary grades (Tr. 212). Thus, the State standards recognize that elementary-level students can appropriately be taught by any teacher with skills appropriate to the student's young age, those in grade 6 and above are expected to be taught by teachers with specialty licenses in a given subject (Tr. 212, 256-57). As described above, the school's deficiencies in teaching to state standards for middle- and upper-level students at

the school were particularly cited in the State Report (G.C. Ex. 4, pp. 13, 16 landscape, 2 portrait).

Cooperman felt that given the lack of specialty licensing among the school's middle- and upper-grade-level teachers, the best way to remedy the non-compliance with teaching to State standards as noted by the Report was to have teachers of the mid-level and older students choose a single subject area in which they felt most confident. The teacher could then prepare to teach a single subject, with her assistance, rather than continue to attempt to teach all subjects (Tr. 213-14). She felt this "departmentalizing" of teachers to make them specialists in particular subjects would make their responsibilities more manageable and allow her to more effectively train them (Tr. 214). She likewise felt departmentalization would enhance the education of the students in grades 6 and above (ALJD p. 4, Tr. 198-99, 204, 206, 214).

Cooperman tried several times to speak with Kasner about departmentalization during her first week, but Kasner repeatedly put her off, citing other pressing matters (Tr. 205). Cooperman did discuss departmentalization with Dawes, who expressed reservations about potential disruption caused by students changing classrooms (ALJD p. 4, Tr. 413-15). During Cooperman's second week, Kasner said that Dawes had told her about Cooperman's idea, and expressed some concerns. Kasner then asked Cooperman to describe her ideas, and Cooperman did so (Tr. 198, 204, 206, 49-51, 413). She told Kasner that departmentalization would be best for the students and allow her the best framework for supervising and assisting teachers. She explained that she would have a better chance of developing each teacher's talents if they could each be focused on a

single subject (Tr. 205, 47).⁹ Cooperman told Kasner that this should occur as soon as possible, in September, because of the number of new, inexperienced and unlicensed teachers scheduled to begin working at the school in the fall (Tr. 204). Kasner told Cooperman that she was concerned about transition time for students moving between classrooms (Tr. 45, 119, 197). Nevertheless, Kasner told Cooperman she was open to the idea, and asked Cooperman to write up the departmentalization plan for presentation to the Board of Trustees (Tr. 198, 206, 45).

At a Leadership Team meeting on July, 28, Respondent insisted that Rouse and Piccigallo had to be discharged.

On Friday, July 28, 2006, Cooperman attended her first leadership team meeting, along with Kasner, Osman, and Pierre (Tr. 185). No agenda had been announced; Kasner asked the group whether there was anything they wanted to talk about (Tr. 185-86). Cooperman said that she wanted to talk about distribution of students' Individualized Education Programs (IEPs) to the teaching staff.¹⁰ She said that Piccigallo had asked her earlier in the week about getting IEPs for new students and asked generally how IEPs would get to the teachers, noting that the State had expressed a specific concern about IEP distribution (Tr. 63-64, 71, 186, 438, G.C. Ex. 4, p. 2 portrait).¹¹ As soon as Cooperman mentioned Piccigallo, Osman got red in the face and called him a "fucking ...," without finishing the expression (Tr. 186). He rose from his chair and said, "if he

⁹ Kasner testified that Cooperman told her she could "only" supervise teachers if they were departmentalized (Tr. 47, 120).

¹⁰ All students at the school have IEPs, which contain short- and long-term goals with respect to education, speech therapy, and other needs of the student (Tr. 219).

¹¹ Piccigallo testified that he asked Cooperman to get a copy of an IEP for a student who was visiting his classroom but had not been officially placed yet (Tr. 438). He was particularly concerned about getting the IEP because he was aware the State Report had found the school not in compliance with the requirements that teachers have copies of IEPs (Tr. 438, G.C. Ex. 4, p. 2 portrait). IEPs were kept in a binder in a sometimes-locked cabinet in the main office, along with other related papers (Tr. 219, 221, 466-67, 501). At the time Piccigallo asked Cooperman for the IEP, he knew how to find and review IEPs, but not that he could make and retain a copy for himself (Tr. 467).

were in front of me, I'd punch him out... . What does he want me to do, copy all the IEPs for him?" (ALJD p. 5, Tr. 186-87). Cooperman said that the secretary could copy the IEPs and asked Osman why he was so angry (Tr. 68, 187).¹² Kasner said that earlier in the week the Union representatives had walked out in protest over management having a recorder at a meeting about the janitor's grievance (ALJD p. 5, Tr. 187). She said that she and Osman also thought Piccigallo had been insubordinate earlier in the week because he refused to take a new student into his classroom when Osman introduced him as a visitor (ALJD p. 5, Tr. 187-89). Cooperman said that in the future they should bring a visiting child to her so that as the teachers' direct supervisor she could make a placement for the child, and that if Piccigallo refused her directive to take in a student she would write him up (Tr. 189-90). At that point Osman and Kasner said that the Union leadership was a problem at the school. Cooperman told them that she was uncomfortable being asked to "go after" the Union leaders in her position as the sole licensed administrator (ALJD p. 5, Tr. 190). Cooperman said that the teachers had to like her, and then corrected herself to say that they had to trust her (Tr. 190). Pierre said, "no, they have to like you, but you still don't understand. Chris and James have caused a lot of problems at the school, and they really have to go." (ALJD p. 5, Tr. 190). Osman echoed Pierre, saying they were, "trouble for the school" and "had to go" (Tr. 192). Osman said that he didn't understand Cooperman, because "the paycheck is God" and if

¹² Osman described a conversation with Cooperman about Piccigallo's IEP request outside of the context of a Leadership Team meeting. He recalled telling Cooperman that Piccigallo's claim of inability to access IEPs meant he didn't know anything about his students and was therefore incompetent. (Tr. 502-03). On cross-examination, Osman acknowledged that he told Cooperman that a teacher who did not know how to get IEPs was either incompetent or had a secondary agenda (Tr. 548). He initially refused to directly answer what he meant by "secondary agenda," denying that it had anything to do with the Union (Tr. 549). After much interrogation about the matter, Osman testified that he believed that by asking Cooperman for the IEP, Piccigallo was attempting to instigate conflict between Cooperman and Osman (Tr. 549-554). He did not specifically deny having threatened to hit Piccigallo.

Cooperman didn't follow Kasner's directives her job would be in jeopardy. He said he didn't understand why Cooperman was resisting (Tr. 190).¹³

At the end of the meeting, Kasner announced that whole leadership team would attend any staff meetings held by Cooperman (Tr. 191). Cooperman asked whether she could then be present at Osman and Kasner's meetings and Kasner said she could not (Tr. 191). Kasner then announced that the next leadership team meeting would be on Monday, July 31, and that "facilitator" Sandy Kahn, who consults with the Board of Trustees, would be present (ALJD p. 5, Tr. 191).

After the meeting, Cooperman followed Osman into his office and asked him why he was so angry, since he had only one week more experience at the school than she had herself (ALJD p. 5, Tr. 191-92, 194, 223). Osman told Cooperman that they were both being tested as new administrators and if Kasner said that Rouse and Piccigallo had to go, then they had to go (ALJD p. 5, Tr. 194). Cooperman asked Osman whether he knew about the State Report, and he said he did not (Tr. 194-95, 222). Cooperman told him that the State had condemned the educational program at the school and that the leadership team had to address the issues raised by the State to improve the educational environment (Tr. 195). She told him that if the team spent all their time arguing about Rouse and Piccigallo they would be detracting from the business of running the school (ALJD p. 5, Tr. 195, 222, 252). She noted that the broader issue that she raised about IEP

¹³ Kasner testified that she told Cooperman she would have "some questions" about Piccigallo asking how to get an IEP (Tr. 65). Though initially reluctant to admit it, Kasner acknowledged that in her affidavit she stated that she told Cooperman to "consider the motives" of Piccigallo in asking for the IEP (Tr. 66). Kasner testified that she "was trying to ... encourage Mrs. Cooperman to think a little deeper." (Tr. 66). She said that Piccigallo was presenting himself as without knowledge of how the school operated (Tr. 67). When pressed during her 611(c) testimony, she acknowledged that she told Cooperman not to take Piccigallo "at face value" and that she found it "odd" that Piccigallo asked about the IEP and told Cooperman to consider this oddness in her capacity as his supervisor (Tr. 68). While Kasner acknowledged that a secretary could copy the IEP, she insisted that Cooperman "think about what was going on with Mr. Piccigallo" in her capacity as his supervisor (Tr. 68-69).

availability had been lost in the argument about Piccigallo (Tr. 195). She told Osman that Kasner was not licensed as a school administrator and was limited by the State to spending 25% of her time on administrative functions (ALJD p. 5, Tr. 195, 222, 252).

On July 31, 2006, Kasner rejected Cooperman's departmentalization plan.

On the morning of the following Monday, July 31, Cooperman asked Piccigallo what had happened with respect to the matters that had been raised at the leadership meeting (Tr. 196, 436, 439). With respect to the grievance meeting, Piccigallo explained that while he and Rouse didn't mind the concept of a recorder, management had chosen the Assistant Dean to be the recorder, and they did not trust her to take unbiased minutes (Tr. 196). With respect to the visiting child, Piccigallo said that on the day in question he was going to take his class swimming, and the child did not have a permission slip for that activity (Tr. 196).¹⁴ Piccigallo expressed surprise that anyone had raised this as a problem, because Osman had not made an issue of it at the time (Tr. 196-97, 436).

While Cooperman was speaking with Piccigallo, Kasner called Cooperman and Osman into her office, and asked Cooperman whether she had told Osman that Kasner was incompetent (ALJD p. 5, Tr. 197, 252-53).¹⁵ Cooperman was stunned by the accusation and denied it (ALJD p. 5, Tr. 71-72, 197, 251-53). She said that she had told Osman that Kasner was not certified and that her time spent on administrative duties was specifically limited in the State Report (ALJD p. 5, Tr. 197, 252-53). Kasner said she

¹⁴ Piccigallo described the incident somewhat differently, recalling that the student in question was not being allowed to join the class going swimming because he had been misbehaving (Tr. 435-36).

¹⁵ Kasner testified that Osman told her Cooperman said Kasner should not be in her position and would not take direction from Kasner (Tr. 70). Osman testified that Cooperman had told him that Kasner wasn't fit for her position and that he had reported to Kasner that Cooperman said she didn't "fit in her chair", but did not testify to saying that Cooperman refused to take direction from Kasner. (Tr. 505, 507, 538-39).

knew Cooperman would say that, and then asked Osman to leave (Tr. 72, 197, 253).¹⁶ Kasner then told Cooperman, “you know those changes you wanted to make in the school?” Cooperman said yes, understanding that Kasner was referring to their discussion about departmentalization (ALJD p. 5, Tr. 197). Kasner then said, “You’re not making them.” (ALJD p. 5, Tr. 79, 197, 221, 251). Cooperman began suggesting ways the proposed changes could be modified. Specifically, with respect to Kasner’s concerns about time lost to students transitioning between classes, Cooperman said that the teachers could move between classes as students remained in one place (Tr. 198, 214). Kasner said that while Cooperman’s idea was interesting, she was, “not getting it. I’m not letting you do anything here next year,” and asked, “does that make you want to leave?” (ALJD p. 5, Tr. 198, 221, 251). Cooperman said it did not. She then left Kasner’s office (Tr. 198).¹⁷

Respondent discharged Linda Cooperman on August 1, 2006, after her second Leadership Team meeting.

The next day, August 1, Cooperman attended a second leadership team meeting, along with Kasner, Osman, Bradley, Pierre, and Sandy Kahn (ALJD p. 5, Tr. 199, 398). Kasner discussed re-instituting class reviews and solicited ideas about them (Tr. 199-200). During the meeting, Kasner went to the bathroom.¹⁸ Upon her return, Kasner said, “there is a member of the leadership team who is willing to take my input on the teachers on the staff, except for the two Union leaders.” (ALJD p. 5-6, Tr. 200).

¹⁶ Osman did not testify about this meeting.

¹⁷ In response to questions from Respondent’s counsel, Cooperman explained that she did not push back when Kasner said she could not make the changes because Kasner’s attitude toward her was very aggressive and Cooperman was fearful for her job, which she needed, financially (Tr. 250). She said that Kasner had a smile on her face when she asked Cooperman whether she wanted to leave, and that she “wasn’t about to push back at a person in that kind of frame of mind or mood” (Tr. 251).

¹⁸ Respondent’s witnesses testified that while Kasner was out of the room, Cooperman expressed frustration about Kasner’s refusal to implement her ideas for departmentalization (Tr. 400, 566-67).

Cooperman told the group that she was being put in a difficult position because of her refusal to create a hostile work environment for Rouse and Piccigallo. She said that she did not like being characterized as someone who could be manipulated or who was not a “team player” (ALJD p. 6, Tr. 201).

Kahn told Cooperman that she wasn’t, “getting it”. She said that it wasn’t only Kasner but Martha Bernard and the Board of Trustees who all wanted the Union leaders to go (Tr. 201). Kahn said that Rouse and Piccigallo had not only caused trouble for the school but a great deal of legal expense. She said the two had to go and that Cooperman’s refusal to assist with that goal was going to create a problem for Kasner (ALJD p. 6, Tr. 201). The meeting then ended (Tr. 201).

Shortly thereafter, Kasner called Cooperman into her office. When Kasner asked the bookkeeper to join them, Cooperman asked Kasner whether she was being fired. Kasner confirmed that she was, and allowed for no possibility of working matters out (ALJD p. 6, Tr. 202, 249, 615-16). Respondent failed to provide Cooperman with a reason for her discharge.

On the following day, Kasner sent a memo to the school staff announcing Cooperman’s departure, again providing no reason (G.C. Ex. 6). Cooperman sent an email to Trustee Howard Johnson in which she related Kasner’s hostility toward “certain members of the teaching staff” and Kasner’s directive that Cooperman create a hostile work environment for these teachers for reasons unrelated to their competence in their jobs (ALJD p. 6, Tr. 202-03, G.C. Ex. 8). Cooperman explained to Johnson that her resistance to this directive from Kasner resulted in her discharge (ALJD p. 6, Tr. 202-03, G.C. Ex. 8).

A School Custodian overheard Kasner and Bernard admitting that Cooperman had been fired for not discharging Piccigallo and Rouse.¹⁹

Edwin Blowe, who worked as the head of maintenance at the school in the summer of 2006, was working in the front office a few days after Cooperman was fired and overheard a conversation between Bernard and Kasner (ALJD p. 6, Tr. 652, 655). Kasner told Bernard that Cooperman didn't want to follow her rules. (ALJD p. 6, Tr. 654, 682) Kasner said that she wanted to get rid of her headaches, and identified her headaches as Rouse and Piccigallo (ALJD p. 7, Tr. 654, 682). While Kasner and Bernard also talked about changes that Cooperman wanted to make at the school which could not be rushed, Blowe testified that, as he heard the discussion, "the big issue was because they wanted to get rid of Piccigallo and Mr. Rouse" (Tr. 652, 658, 681-82). In the same conversation Bernard and Kasner, "were saying they didn't want no union" and wanted to get the Union out of the school (Tr. 659-60). He specifically recalled Bernard saying, "it would be better if the building wouldn't have a union in it because we don't need a union" (Tr. 660).

Respondent continued to display of hostility toward the Union and its representatives after firing Cooperman.

Osman threw a contract at the Union delegate during a grievance meeting.

In September, 2006, the Union filed two grievances. One concerned a directive Osman issued to the social work staff to call his cell phone when they were going to be absent, and the other concerned Respondent's refusal to give the Union and members job descriptions for that school year (ALJD p. 7, Tr. 295, 447, 469-470, 536). Immediately

¹⁹ For reasons discussed in more detail below, the General Counsel wishes to present Blowe's testimony in greater detail than the ALJ relied upon in his decision.

after the Union filed these grievances, to the surprise of the Union representatives, xeroxed copies appeared in staff members' mailboxes (Tr. 296, 370, 447, 472). It is not the Union's practice to distribute copies of grievances to the staff, and the Union representatives had not distributed these (Tr. 296, 473).

On September 26, 2006, a grievance meeting was held in Kasner's office over the grievance involving Osman's directive that social work staff call his cell phone (Tr. 296, 344, G.C. Ex. 14). In attendance were Kasner, Osman, Rouse, and Piccigallo (Tr. 296-97). Osman complained in the course of the meeting that he was not obliged to deal with Piccigallo and Rouse, accusing Piccigallo of only representing himself (Tr. 297, 451-52, G.C. Ex. 14, p. 8). The representatives explained that there were grievance procedures which had to be followed, and that bargaining should be conducted with the Union representatives and not with unit members directly when a representative is not present (ALJD p. 7, Tr. 297, G.C. Ex. 14, pp. 6-10).²⁰ Osman asked whether he was being accused of illegal behavior, and Rouse explained that Osman had violated the contract (ALJD p. 7, Tr. 298, 372-73, 450 G.C. Ex. 14). Osman became angry and hit his hand against the table, repeatedly accusing Rouse of saying he had done something illegal (Tr. 298, 372-73, 450, 552, G.C. Ex. 14). He loudly demanded that Rouse show him the relevant contract provision. He then picked up a copy of the contract and shook it, repeating, "show me, show me" (ALJD p. 7, Tr. 299, G.C. Ex. 14). He then flung the contract at Rouse from about seven feet away, hitting him in the stomach and producing an audible thud in the recording (ALJD p. 7, Tr. 299, 450-51, G.C. Ex. 14).²¹ Piccigallo

²⁰ Osman had talked directly to the social workers about the grievance regarding his cell phone directive (Tr. 371, 520, 537-38).

²¹ Osman and Kasner did not deny that the contract was thrown but testified that Osman had only tossed the contract gently and that it slid over the edge of the table into Rouse's lap (Tr. 552, 613-14).

said there was a problem, Kasner agreed, and the Union representatives left the room (Tr. 299-300, 451, G.C. Ex. 14).²² Kasner issued a memo regretting the breakdown of the meeting (G.C. Ex. 5, Tr. 76-77, 614). The representatives reported the incident to the police and to Trustee Howard Johnson (Tr. 302-03, 452, G.C. Ex. 12).

Kasner threatened to discharge a temporary employee and increase Rouse and Piccigallo's duties if they pursued a grievance on behalf of the employee.

On March 6, 2007²³, Rouse and Piccigallo met with Kasner about a grievance seeking health insurance for a substitute teacher (ALJD p. 7, G.C. Ex. 7, p. 2). Kasner told Rouse & Piccigallo that temporary employees, including the teacher in question, are not covered by the Union contract. Kasner replied, "You know what? You know what I'm going to do? You guys want to push this? I won't have any temporary teachers, and you guys can figure out how you're going to cover the classes." She then said she would fire the teacher at issue and repeated that Rouse and Piccigallo could figure out how to cover classes (ALJD p. 8, Tr. 634, G.C. Ex. 7, p. 3). Piccigallo tried to continue the conversation, but Kasner insisted she could fire the temporary teachers and refused to discuss the matter further. She then changed the subject to janitorial hours, saying that she wanted to keep the school cleaner. She told Rouse and Piccigallo, "You guys are getting in the way of my doing things to improve the running of the school, and I resent it, and I'm sick of it." (ALJD p. 8, G.C. Ex. 7, p. 4). Rouse said she was being unfair and Kasner said she didn't want to hear from him, though she acknowledged that she had asked Piccigallo to come into her office (G.C. Ex. 7, p. 5). Rouse tried to calm Kasner,

²² Kasner agreed that Osman's behavior was "problematic" at the meeting; that he had lost his temper and that she was unhappy with his behavior (Tr. 74). Kasner testified that Osman was "verbally corrected" by herself and "other members of the school's team," but acknowledged he was not issued any written discipline (Tr. 77-78).

²³ The ALJ's decision references this incident as occurring in May rather than March 2007.

who answered that she didn't want to calm down. She then suggested a date for another meeting (G.C. Ex. 7, p. 5).

Current Instructional Supervisor Barry Malloy told Rouse that unfair harassment against him will continue regardless of his job performance.

Although the ALJ didn't rely on the following information the General Counsel deems it important to note Rouse's testimony in regards to his conversations with Barry Malloy. In late April, 2007, Respondent's current Instructional Supervisor, Barry Malloy, told Rouse that he should be careful about handing out Union cards to new members because he was being watched and his actions, "could be misunderstood" (ALJD p. 8, Tr. 306).²⁴ The two had several additional conversations in early May of 2007, in which Malloy admitted that Respondent has been unfairly harassing Rouse (ALJD p. 8-9, Tr. 306-07, 336).

The conversations between Malloy and Rouse were prompted by Osman asking Malloy to investigate Rouse for an absence from the school building at a time he was scheduled to be teaching (Tr. 307-08, 315). Malloy asked Rouse about the matter in question, and Rouse told Malloy that he had been in his classroom (Tr. 308-9). Rouse then told Malloy he thought Respondent was harassing him and Piccigallo, since Osman had made prior false allegations against them (Tr. 309). Malloy agreed with Rouse, saying he saw Osman's behavior "very clearly" and that he saw it, "for sure as harassment." Malloy told Rouse he had tried to talk to Osman about the matter to no avail (Tr. 310). When Rouse asked for guidance, Malloy advised Rouse to stay in his classroom, but Rouse countered that he had to circulate in the building to perform his Union duties, which Malloy acknowledged (Tr. 311, 394). Malloy told Rouse to avoid

²⁴ Barry Malloy has been Respondent's Instructional Supervisor since September 7, 2006 (Tr. 689).

Osman as much as he could, but said he believed that Kasner was behind the harassment and that it was deliberate and would continue (ALJD p. 9, Tr. 310-12). Malloy told Rouse that Kasner seemed more angry with Rouse lately, and suggested that she seemed to think he was against “against her because of the pending NLRB case.” (Tr. 311). Malloy told Rouse that if Kasner thought he would be resigning from the School she might have “a change of heart about the harassment” (ALJD p. 9, Tr. 312). Malloy told Rouse that he disagreed with Osman and Kasner and had told them several times that Rouse had the right to engage in Union activities, and that they had responded to him that no Union activity was to be conducted during school time, “period” (Tr. 312).

During this conversation, Malloy read Rouse parts of a letter he said he had written to Osman which stated that several staff members had confirmed that Rouse had not been outside the building during class time as Osman had alleged, and that he felt the mistreatment of Rouse was “wrong” (Tr. 313). Shortly thereafter, Malloy told Rouse that Osman had revised his accusation and was claiming that Rouse was allegedly outside earlier than first claimed. The new time cited was during Rouse’s prep period (Tr. 314-15). Rouse told Malloy that although he was allowed to be outside during his prep period he did not feel comfortable answering Malloy about the specific time in question without a Union representative present (Tr. 315, 345).²⁵ Malloy told Rouse that he had told Osman the whole issue was ridiculous (Tr. 315).

During this conversation, Malloy again told Rouse that he disagreed with Respondent’s treatment of Rouse (Tr. 316). He said that Kasner and Osman would view

²⁵ During cross-examination, Rouse testified that he did have a cigarette outside the building during the second period on the day in question, which is his prep period (Tr. 342-43). Respondent has no rules against smoking outside the school during a break in the school day, and Rouse meets other teachers on these smoking breaks (Tr. 343, 390, 394).

him as being “in collusion” with Rouse if he were to take Rouse’s side, even if he were simply stating the truth (Tr. 316). Malloy did not testify about any of his conversations with Rouse. At the time of the trial, a grievance was pending against Respondent for its harassment of Rouse and Piccigallo (Tr. 144).

IV. ARGUMENT

A. The Administrative Law Judge erred in failing to order reinstatement of Cooperman

Although the ALJ found in favor of General Counsel, he reached an unprecedented²⁶ determination in declining to order the reinstatement of Cooperman. Even had the ALJ’s decision not to reinstate Cooperman been grounded in solid precedent, he reached that decision based upon flawed reasoning. In his decision the ALJ conceded that the Board and the Courts have generally ordered the reinstatement of discharged supervisors. (ALJD p. 11) *see also Professional Medical Transport, Inc.*, 346 NLRB No. 108 (2006) (manager offered reinstatement after termination for refusing to terminate and discipline union supporters and for discouraging others from committing unfair labor practices); *Pioneer Hotel, Inc.*, 324 NLRB 918 (1997) (supervisor offered reinstatement after termination for refusing to terminate a known union activist); *Trus Joist Macmillan*, 341 NLRB 369 (2004) (supervisor offered reinstatement after termination for refusing to give union supporters negative evaluations). Note also that the ALJ offered no cases in support of his position. In fact the ALJ cites only one case in rationalizing his decision not to award reinstatement, *Kenrich Petrochemicals v. NLRB*,

²⁶ General Counsel is unaware of any cases in which the Board failed to offer reinstatement as a remedy merely because the alleged discriminatee was a Section 2(11) supervisor.

907 F.2d 400 (3rd Cir. 1990), a case in which the Third Circuit actually affirmed the Board's decision to reinstate a discharged supervisor.

The ALJ's failure to order the reinstatement of Cooperman is in direct contrast with the Board's policy in awarding reinstatement to victims of unfair labor practices. In determining an appropriate remedy for an unfair labor practice the Board concerns itself with both recompensing the victims of unfair labor practices and in effectuating the policies of the Act, including the encouragement of collective bargaining and the freedom of association. *Id* at 406. Where supervisors are discharged for failing to commit an unfair labor practice, reinstatement will be justified on the ground that it dissipates the effects of an unfair labor practice and restores the status quo. *Id* at 411; citing *Talladega Cotton Factory*, 213 F.2d 209, 217 (5th Cir. 1954); *see also Delling v. NLRB*, 869 F.2d 1397 10th Cir. 1989); *Howard Johnson v. NLRB*, 702 F.2d 1 (1st Cir. 1983) ; *Belcher Towing Co. v. NLRB*, 614 F.2d 88 (5th Cir. 1980); *Russell Stover Candies, Inc. v. NLRB*, 551 F.2d 204 (8th Cir. 1977). Reinstatement is also necessary to prevent the intimidation of employees' Section 7 rights. *Kenrich Petrochemicals, supra* at 411.

The ALJ relies on the following factors in making his decision not to order Cooperman's reinstatement: Cooperman was not employed as a low level supervisor but rather the second highest manager at the school; the notion that Kasner likely viewed Cooperman as a rival; and Kasner and Cooperman's differences of opinion on significant policy issues at the school. Based on these factors and the obligations of the School to provide services to children with cognitive and emotional problems, the ALJ speculated that Cooperman's reinstatement would create a dysfunctional management team at the School.

The ALJ's rationale fails threefold. First and as discussed above, the ALJ provided no precedent to support the notion that reinstatement should be denied under the above described factors upon which the ALJ relied. Secondly the ALJ bases his determination on unlitigated assumptions and misconstructions of the evidence. Whether Kasner actually viewed Cooperman as a rival was never raised or litigated at trial. In fact, the proven evidence at least equally points to the opposite conclusion in that it shows that Kasner herself hired Cooperman because Kasner appreciated Cooperman's interesting ideas and career background in education. (Tr. 30, Tr. 35-36, 131).

Likewise, according to the record, the only significant policy matter to which Kasner and Cooperman may have had differences of opinion was departmentalization. According to the testimony of both Kasner and Cooperman, Kasner was not immediately opposed to departmentalization and requested additional information from Cooperman on her plan to departmentalize the school and asked Cooperman to write up the departmentalization plan (Tr. 45, 49-51, 198, 206). It wasn't until Cooperman made clear to Kasner that she would not engage in unfair labor practices against Rouse and Piccigallo that Kasner officially rejected Cooperman's departmentalization plan (Tr. 79, 185-191, 197, 221). This suggests that Kasner's rejection of Cooperman's plan was actually pretext for her true reason for retaliating against Cooperman, Cooperman's protected activities. Thus the judge should not have considered this factor in his decision not to grant Cooperman reinstatement.

Thirdly, the Board's policy for awarding reinstatement should prevail in this case. Cooperman should be reinstated to restore the status quo to the environment before the unfair labor practice against Cooperman was committed. The fact that Cooperman was

one of the two top managers of the Schools should bear significant weight in the decision of whether to award reinstatement. High level managers are in the limelight in the workplace. Their actions and the actions of others towards those high level managers are carefully observed by employees. Accordingly, what greater intimidating anti-union message could an Employer send to its own employees than to terminate a high level manager for her failure to commit unfair labor practices against employees because of their union activities? Cooperman must be reinstated to help quell the effect of her discharge on Respondent's employees.

Moreover the ALJ asserts that Cooperman's reinstatement will result in a dysfunctional management system at the school. The ALJ ignores the fact that the reinstatement of unlawfully discharged managers will inevitably be awkward and require a certain level of effort and adjusting. Regardless of the awkward environment created by reinstatement the Board nonetheless grants reinstatement of unlawfully discharged supervisors time and time again. Further in refusing to grant reinstatement, the ALJ misconstrues the role of the Board, whose function is not to ensure a well functioning management team, but to mitigate if not erase the effects of the unfair labor practices. Accordingly the ALJ should have ordered that Cooperman be reinstated.

B. The Administrative Law Judge's findings in regards to the audio recordings were erroneous

i. The ALJ erred in finding that Rouse's audio recordings during grievance meetings in September 2006 and May 2007 were not properly admitted

In his decision the ALJ expressed some doubt regarding his admission of the audio recordings, taken by Rouse at grievance meetings in September 2006 and May 2007

based on *Triple A Fire Protection*, 415 NLRB 409, 411 (1994) which expressed the Board's policy of precluding secret recordings of negotiation sessions. For the following reasons, the ALJ's was incorrect in his finding that the audio recordings were not properly admitted.

First and foremost the audio recordings were of grievance meetings and *not contract negotiation sessions*. Further there is no indication in the *Triple A Fire, supra* decision that the Board intended the announced policy on audio recordings to extend to recordings of events outside the realm of contract negotiation sessions. In general Board precedent allows for the admission of surreptitious recordings into evidence, *Orange County Publications*, 334 NLRB 350 (2001) citing *East Belden Corp.*, 239 NLRB 776, 782 (1978), *enfd.* 634 F.2d 635 (9th Cir. 1980) ; *See also Wellstream Corp.*, 313 NLRB 699, 711 (1994); *cf. Waltz Masonry*, 323 NLRB 1258 (1997); and *Monroe Mfg.*, 323 NLRB 24 (1997), a rule to which *Triple A Fire, supra* represents a narrow exception.

Even accepting for argument's sake that grievance meetings may be analogized to negotiation sessions, the circumstances of the admission of the recordings in question distinguishes them from those found inadmissible in Board cases. In *Carpenter Sprinkler Corp.*, 238 NLRB 974 (1978) and *Triple A Fire Protection*, 315 NLRB 409 (1994), the Board considered recordings of contract negotiation sessions which were offered in evidence in cases involving violations of the employers' obligation to bargain under Section 8(a)(5). Such recordings were determined inadmissible because of their potential chilling effect on the free flow of ideas between parties during bargaining. The instant case does not involve bargaining allegations and the substance of the parties' discussions in those meetings is not in issue. The recordings were offered and admitted for the

narrow purpose of providing corroborative evidence of animus against Rouse and Piccigallo. Thus, the Board's reasoning in the cited cases does not apply to these exhibits, which are more analogous to the evidence admitted by the Board in *East Belden Corp, supra*.

ii. The ALJ erred in failing to allow the General Counsel to present corroborative evidence regarding the content of the recordings in light of the ALJ's later finding that the recordings were improperly admitted

Additionally, should the Board affirm the ALJ's finding that the recordings were improperly admitted, then the ALJ additionally erred by refusing to allow the General Counsel to present corroborative testimonial evidence of the recorded events. During the course of the trial the ALJ properly admitted the recordings of the September 2006 and March 2007 grievance meetings. The ALJ permitted Rouse to testify about the September 2006 meeting (Tr. 296-300) but prevented General Counsel from questioning Rouse about the March 2007 meeting because he had already admitted the transcript of the recording with the agreement of all parties of its accuracy (Tr. 304-05). The following dialogue transpired between the ALJ and General Counsel during Rouse's direct testimony:

JUDGE GREEN: Is there anything else that he's going to testify about, since we already have a transcript with at least a portion of the meeting?

MS. RINGEL: I was just corroborating. But if Your Honor --

JUDGE GREEN: -- There's nothing to corroborate.

MS. RINGEL: Okay. I'll note that --

JUDGE GREEN: -- That doesn't mean necessarily that he can't testify about matters relating to matters that are not contained in the transcript. There may have been other conversations. So I just want to make it clear that we have a transcript of at least a portion of the meeting. Everybody has agreed that that's what took place.

MS. RINGEL: Thank you, Your Honor.

JUDGE GREEN: And unless he has something new to add to it, I don't need to know more.

MS. RINGEL: I'll ask him only one question then, Your Honor.

Q Do you recall the tone of voice of the three of you during that meeting?

A Yes, I do.

Q What was that?

A Ms. Kasner was yelling, and Mr. Piccigallo and myself were not yelling. (Tr. 304-305).

Consequently because the ALJ denied General Counsel the ability to corroborate this extremely significant evidence, that he later deemed to be improperly admitted, the Board should not adopt the ALJ's finding that the recordings were improperly admitted.

iii. The ALJ erred in failing to find that even in the absence of recorded evidence, the testimony about the recorded events demonstrates significant animus by Respondent towards Rouse and Piccigallo

Finally even if the Board were to adopt the ALJ's finding that the recordings were not properly admitted, the Board will find sufficient evidence on the record, of the recorded meetings, to establish Respondent's animus reflected in those meetings. Rouse's testimony of the September 2006 meeting demonstrated that Osman told Rouse that he didn't feel that he had to deal with Piccigallo as a union representative and that he believed that Piccigallo represented himself. (Tr. 297). Also during the course of this meeting Osman got extremely agitated, started to bang his hand on the table and eventually threw a copy of the union contract at Rouse. (Tr. 298-299, ALJD p. 7). The limited testimony from the March 2007 meeting reveals that Kasner was agitated and yelling during the course of the meeting. (Tr. 305-305). Hence even in the absence of

the recorded evidence, there is sufficient evidence of animus on the record of the recorded September and March grievance meetings.

C. The Administrative Law Judge erred in making several significant credibility determinations

i. The ALJ erred in failing to credit Cooperman more generally than he did

While the ALJ credited Cooperman's testimony to the extent that it contradicted that of Kasner and didn't *discredit* the testimony of Cooperman in any way, he erred in failing to credit all of Cooperman's testimony more generally over that of Respondent's witnesses. Cooperman's testimony establishes that Respondent repeatedly told her to create a hostile working environment for the two Union representatives at the school. Her testimony is in accord with the evidence reviewed above showing Respondent's active unfair hostility toward Rouse and Piccigallo because of their Union activities, both before and after Cooperman's tenure.

The ALJ credited Cooperman based on her demeanor on the witness stand. (ALJD p. 4). As evidenced by the transcripts, Cooperman's testimony was consistent and clear. Where there were witnesses to events who were not aligned with Respondent's interests, she was corroborated. By contrast, as evidenced by the transcripts, Respondent's witnesses were at times internally inconsistent and failed to corroborate other Respondent witness testimony on important points. Moreover the ALJ should have credited Cooperman's testimony more generally than he did over that of Respondent's witnesses.

ii. The ALJ erred in failing to specifically discredit Kasner and Osman more generally than he did

General Counsel excepts to the ALJ's failure to specifically discredit Kasner and Osman. The ALJ erred in only discrediting Kasner to the extent that her testimony contradicted that of Cooperman and in not discrediting Osman. Respondent argues in its defense that there were a multitude of reasons why Respondent was dissatisfied with Rouse and Piccigallo yet Kasner and Osman repeatedly provide contradictory testimony on this very issue. Kasner testified at turns that Piccigallo is one of the better teachers at the school and that he has shortcomings as a teacher which occasionally annoy her (Tr. 90-91). She also testified without any corroboration that Rouse insulted her repeatedly and extremely harshly, both before and after Cooperman's tenure (Tr. 699-702) but that she never disciplined Rouse for any such insults, though, because it, "wasn't my place to do so" (Tr. 703). Moreover Osman testified vaguely that there was "concern" about Piccigallo and Rouse, but then said this was not really about Piccigallo, since he is a "very good teacher," though sometimes overly loud (Tr. 527, 529).

Kasner's contradictory testimony extended as well to her testimony regarding Cooperman. Kasner testified at length about various complaints she and others had about Cooperman's supposedly abrasive personality, but her testimony was short on specifics, self-serving and largely uncorroborated. Kasner testified to a litany of complaints by Dawes about Cooperman's manner, claiming that Dawes told her she found Cooperman hostile, critical, argumentative, and unreceptive to feedback, and that Dawes was also critical of Cooperman's manner with students (Tr. 38, 598). Dawes's own testimony about Cooperman was significantly more measured. Dawes recalled telling Kasner that she found Cooperman's negative reaction to the Junior Great Books program insulting to

her own judgment and that Cooperman was a “know-it-all” (Tr. 416-19). Even when asked leading questions by Respondent counsel, though, Dawes did not recall ever describing Cooperman as rude or condescending, and she did not testify to having any concerns about Cooperman’s interaction with students (Tr. 419-20). Consequently Kasner and Osman were unreliable witnesses.

iii. The ALJ erred in failing to specifically credit Rouse and Piccigallo

The ALJ failed to credit Rouse and Piccigallo’s testimony. Both Rouse and Piccigallo were very strong witnesses. Their testimony was clear, concise and confident. Moreover they consistently corroborated each other as well as Cooperman’s testimony. For these very reasons, the ALJ should have specifically credited Rouse and Piccigallo’s testimony.

iv. The ALJ erred in failing to draw an adverse inference from Malloy’s lack of testimony contradicting Rouse

As noted by the ALJ current Instructional Supervisor Malloy was not asked and did not deny any of the conversations with Rouse. (ALJD p. 9). An adverse inference should be drawn from Malloy’s failure to testify about his conversations with Rouse. Malloy confirmed Respondent’s continuing unfair harassment of the Union representatives. At Osman’s prompting, Malloy conducted baseless investigations into Rouse’s time smoking outside the school which predictably turned up no misconduct by Rouse. Malloy told Rouse that Respondent’s harassment would only stop if Rouse were to resign from the school. Otherwise, he could not foresee any decrease in the hostility, which he identified as originating with Kasner.

Well-established precedent dictates that when a party fails to call a witness who may be reasonably assumed to favor that party’s position regarding an issue in dispute, an

adverse inference may be drawn regarding factual questions about which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122 (1987). Such adverse inferences apply as well to witnesses who testify about some subjects but not others. *The Salvation Army*, 345 NLRB No. 48, at fn 7, (2005) (adverse inference warranted where witness does not deny adverse testimony from an opposing witness). Thus the ALJ erred in failing to find an adverse inference in Malloy's failure to testify about his conversations with Rouse.

D. The ALJ made erroneous findings in relation to the testimony of Blowe

i. The ALJ erred in denying General Counsel's offer to read portions of Blowe's affidavit into evidence

In his decision the ALJ erred in refusing to admit and rely on certain significant evidence reflected in Blowe's affidavit. In response to Blowe's extreme difficulty in recalling certain events in detail, General Counsel, citing relevant case law, offered to read portions of Blowe's affidavit into the record. The ALJ denied General Counsel's requests. (Tr. 660-661, 676-677). In his decision the ALJ stated that Blowe did not have a present memory of those statements and that Blowe's affidavit could not be construed as a past recollection recorded nor could Blowe be construed as an adverse witness. (ALJD p. 7 fn 8). The ALJ presented no cases and a very limited rationale in support of this determination.

Board precedent is contrary to the judge's finding. The Board may accept affidavits as past recollections recorded under Section 803(5) of the Federal Rules of Evidence. *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993); *New Life Bakery*, 301 NLRB 421 (1991). The Federal Rules of Evidence provide the following:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. Fed. R. Evid. 803(5)

The admission of the relevant portions of Blowe's affidavit was warranted in this case. As evidenced throughout the transcript, Blowe had tremendous difficulty in testifying to certain events that he had witnessed (and previously described clearly in his affidavit). (Tr. 649-677). The ALJ denied General Counsel's proper offers, under FRE 803(5), to read portions of Blowe's affidavit into the record. Consequently the ALJ erred in failing to admit and more specifically rely upon this evidence.

ii. The ALJ erred in finding that Respondent's attempts to induce Blowe to oust the Union were harmless

The ALJ neglected to acknowledge that Respondent's attempts to recruit Blowe to oust the Union were significant evidence of animus and likely violations of the Act. (ALJD p. 3, 7 fn 8). Blowe's testimony, which was neither specifically credited nor discredited and essentially un rebutted, demonstrates that in the late spring and early summer of 2006, just prior to Kasner's ascension to Executive Director, Respondent was particularly interested in undermining the role of the Union at the school. Blowe recalled former Executive Director Pagliuca and Board Chair Bernard directing him to try to solicit 30% of the school employees in an effort to rid the school of the Union (Tr. 671, 674-75, 678-79).

Pagiluca also told Blowe that the school wanted the union out of the building, and that he only needed a certain number of votes to get the union out and later he called Blowe in to meet with himself and Martha Bernard and informed Blowe that he needed 30% of the votes to remove the Union (Tr. 670-671, 674-675, 678-679). Bernard and Pagliuca then met with Blowe subsequently and Bernard asked Blowe whether he had started “getting the votes” (Tr. 675). Blowe said he had not, and did not speak with them again about the matter (Tr. 675).²⁷

An employer’s encouragement of employees to file a decertification petition is a violation of the Act. *Weisser Optical Co.*, 274 NLRB 961 (1985) citing *Silver Spur Casino*, 270 NLRB 1067 (1984). As evidenced above, Bernard and Pagiluca’s efforts were not, as the ALJ characterized them, mere efforts to inform Blowe of the procedures of the National Labor Relation Board but rather significant evidence of animus and unlawful conduct. Bernard and Pagiluca made repeated concerted efforts to recruit Blowe to gather votes to oust the Union. Further Pagiluca expressed to Blowe’s during the course of these interactions the School’s desire to get rid of the Union. Hence the ALJ erred in belittling this significant piece of evidence.

²⁷ Although Bernard testified that Blowe had initiated this conversation, and that she and Pagliuca had merely referred Blowe to the NLRB, her testimony is incredible in light of all the circumstances. Bernard, unlike Blowe, clearly has a vested interest in the outcome of the case and in avoiding findings that she may have interfered with employee’s rights under the Act. In an effort to couch her version of the meeting in some plausible context, Bernard testified to having understood that “a re-vote or something” was pending about the Union during that time and that Blowe approached the administrators because he wanted to “do something about that” (Tr. 704, G.C. Ex. 3, p. 31). But, there is no evidence of any “re-vote” scheduled or under consideration at the time and the current collective-bargaining agreement had been signed just two months earlier (G.C. Ex. 3). Blowe had no reason to falsify testimony against Respondent’s interests. If anything, his incentives would more likely incline him to support Respondent, given his fears for his fiancé’s current employment at the school (Tr. 667).

V. CONCLUSION

For the foregoing reasons, General Counsel respectfully urges that the findings and conclusions of the Administrative Law Judge excepted to in the instant cross-exceptions be reversed and that the Board make a finding that Respondent violated Section 8(a)(1) of the Act as alleged and order traditional reinstatement, make-whole, and notice remedies.

Dated at New York, New York

October 29, 2007

Respectfully submitted,

A handwritten signature in dark ink, reading "Lindsay R. Parker". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Lindsay R. Parker
Counsel for the General Counsel

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 2

THE LORGE SCHOOL
Respondent

and

LINDA COOPERMAN
Charging Party

Case 2-CA-37967

DATE OF MAILING 10/29/2007

**AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid ~~certified~~ mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 29th day
of October, 20 07

DESIGNATED AGENT

[Signature]

NATIONAL LABOR RELATIONS BOARD